IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR.

J U D G M E N T

Parmeshwari Sahai vs. Madho Narain Saxena and another

S.B.Civil First Appeal No.119/1990
under Section 96 C.P.C. against the
judgment and decree dated 22.2.1990
passed by Shri Satya Narain P. Dave
RHJS, Additional District Judge No.2,
Ajmer in Civil Suit No.56/74(173/85).

Date of Judgment :::::: July 25, 2006

PRESENT

HON'BLE MR.JUSTICE KHEM CHAND SHARMA

Mr.P.K.Sharma for appellants.
None appeared for respondent.

BY THE COURT (ORAL):-

The facts giving rise to this appeal in brief are that the plaintiff-respondent Madho Narain Saxena filed a suit before the learned trial court against the defendant appellants Parmeshwari Sahai Saxena, Raj Narain Saxena and Smt.Kaushlya Devi under Order 7 Rule 1 C.P.C. mentioning therein inter alia that Shri Madan Mohanlal

Saxena was an absolute owner of one four storeyed property bearing AMC No.XIV/124 (old) and 22/57(new) situated inside Usrigate Ajmer. As per the will dated 13th March, 1961 executed by deceased Shri Madan Mohanlal Saxena, the plaintiff and defendants No.1 and 2 have got 1/3rd share each in the said property. It was mentioned that Shri Madan Mohanlal Saxena during his life time also purchased property bearing AMC No.XII/62 known as `Mandirwali building' situated opposite Shri Talkies, Mundari Mohalla, Ajmer from Shri Bajrangdas for a consideration of Rs.10,000/- the description of which has been mentioned in para No.3 of the plaint. It was averred in the plaint that as Shri Madan Mohanlal died intestate so far as this property is concerned, therefore, the plaintiff and the defendants got their respective 1/4th share in the same. After the death of Shri Madan Mohanlal Saxena, property No.XIV/124 (old) jointly belonged to plaintiff Madho Narain Saxena and defendants Raj Narain Saxena and Parmeshwari Sahai Saxena while property No.XII/62 jointly belonged to plaintiff and the three defendants in equal share. It was mentioned in the plaint that the defendant No.2 Parmeshwari Sahai Saxena was receiving rent of the major portions of both the properties and was liable to render true and proper account of the rent received by him. However, the plaintiff mentioned that he was not willing to keep the

property joint and, therefore, claimed partition and separate possession of his 1/3rd share in property No.XIV/124 (old) and 1/4th share in property Ano.XII/62. The plaintiff in these circumstances, prayed for a decree of partition of his shares in both the properties and also for such sum as may be found due and payable to him after rendition of accounts of rent recovered by defendant No.2.

2. Defendants Raj Narain and Mst. Kaushlya Devi filed their written statement in which they did not dispute the facts mentioned in the plaint. They submitted that they also want partition of the properties and possession of their shares.

3. In his written statement, the defendant appellant Parmeshwari Sahai submitted that the property bearing No.AMC No.XIV/124 was purchased by plaintiff Madho Narain, defendants 1 and 2 and one Shri Shiv Prasad jointly vide sale deed dated 4.11.1942. It was also disputed that Shri Madan Mohan Lal, father of the plaintiff and defendants 1 and 2 executed any will on 13.3.1961 or on any other date. It was averred that the defendant appellant contributed Rs.5,000/- out of his personal earnings for acquisition of the property bearing No.AMC XII/62 and also contributed Rs.1,000/- in various litigations of the family with Shri

S.K. Biswas, Shri Bajrang Das, Shri Ram Lal Tailor and Shri Jhamman Lal. The case of the defendant appellant was that he and Shiv Prasad purchased the property situated in Jadughar jointly in 1938 and at that time his father gave Rs.2000/- to him, therefore, the property was jointly purchased. Similarly, on 4.11.1942 property No.AMC 22/57 was purchased for a sum of Rs.10,000/- in the name of Madho Narayan, plaintiff, defendant Nos.1 and 2 and Shiv Prasad. Parmeshwari Sahai filed a suit in regard to the property situated in Jadughar in which Shiv Prasad entered ito a verbal compromise by which Shiv Prasad became the absolute owner of the property of Jadughar and Parmeshwari sahai left his share in that property and in turn Shiv Prasad also left his share in favour of Parmeshwari sahai in property No.AMC 22/57. Thus the share of Shiv Prasad was included in the share of Parmeshwari Sahai. On 18.5.1987 Raj Narayan moved an application under Order 22 rule 10 C.P.C. mentioning therein that he had relinquished his right and title and interest in the properties referred to in paras Nos.1 and 3 of the plaint in favour of Parmeshwari Sahai. Therefore, Parmeshwari Sahai became the sharer of Shiv Prasad in property No.22/57 and thus, Madho Narayan is only entitled to get ¼ share in property No.22/57. Madho Narayan has ¼ share in the other property bearing No.12/62, subjected to contribution of Rs.6,000/- paid by Parmeshwari

Sahai. It was also averred that the plaintiff Madho Narayan was also realising Rs.13/- per month as rent from tenant Shri Ramsajiwan Singh and he also received rent from another tenant Gopal and Narayan Sharma as per the mutual oral agreement among the parties. Thus, he is liable to render the account of whatever rent he has received.

4. In additional pleas it was mentioned that Shiv Prasad was a necessary party to the suit and in his absence no partition of property No.22/57 can be effected. It was also mentioned that Smt. Kaushalya Devi was in custody of the golden ornaments weighing 15 tolas. During her life time she was living with plaintiff Madho Narayan and after her death plaintiff Madho Narayan has unlawfully taken possession of the said ornaments and utensils. It was then mentioned that the plaintiff Madho Narayan despite service of notice dated 23.5.1976 has not shared the same with Raj Narayan and Parmeshwari Sahai. Therefore, the ornaments are also liable to be partitioned.

5. On the basis of the pleadings of the parties, learned trial court framed as many as 13 issues.

6. In support of his case, the plaintiff himself appeared as a witness and also got examined Shyam Narayan and Shyam

Lal as his witnesses. In support of his case, the defendant appellant Parmeshwari Sahai appeared himself as a witness and also got examined Smt. Sharda Saxena as a witness. Some documents were also produced by the parties.

7. Learned trial court after recording evidence of the parties and hearing both the sides decided the suit with the following directions:-

1) Plaintiff and defendant Nos.1 and 2 are entitled to get 1/3 share in property No.22/57.
2) Plaintiff and defendant Nos.1,2 and 3 are entitled to get 1/4th share in property No.12/62 and plaintiff is entitled to get the 1/4th share of defendant No.3.
3) Plaintiff and defendant No.2 will exchange to each other the accounts regarding receipt of rent by them within six months and if they so desire, they can appoint arbitrator for getting the final decree passed.
4) Since, defendant No.1 has applied to relinquish his shares in favour of defendant No.2 during the pendency of the suit, this fact shall be taken into consideration at the time of physical division of the property among the parties.

7. Being aggrieved of the impugned judgment and decree of

the learned trial court, the defendant appellant has preferred the present first appeal.

8. Learned counsel for the appellant has contended that the learned trial court has neither properly appreciated nor critically examined the oral evidence adduced by the parties and has also failed to consider the documentary evidence available on record.

8. After hearing learned counsel for the appellant, I have gone through the impugned judgment as well as the material and evidence available on record.

9. For deciding the dispute between the parties, issues Nos.1,2,3 and 4 are very important, which are as under:-

1. Was Shri Madan Mohan Lal Saxena an absolute owner of the property No.XIV/124(old) = XXII/57(New) situated inside Usrigate Ajmer?

2. Did Shri Madan Mohan Lal Saxena execute will dated 13.3.1961? If so what is its effect?

3. Did defendant No.2 Parmeshwari Sahai contribute Rs.6000/- as alleged in para 3 of his written statement ? If so, what is its effect ?

4. Has Shri Shiv Prasad Saxena also ¼ share in property No.XXII/57 ? And is the suit bad for his mis-joinder?

10. The plaintiff in support of his claim placed reliance on the Will (Ex.1) which was executed by Shri Man Madan

Mohan Lal, father of the plaintiff and the defendant No.1 and 2. This Will was written by Shri Shiv Prasad Saxena. Plaintiff Madho Narayan Saxena PW.1 in his statement has stated that at the time when Madan Mohan Lal put his signatures on each page of Ex.1, he, his mother and his both brothers and Shiv Prasad Saxena, Advocate were present. Shiv Prasad Saxena prepared this document under the instructions of his father in the presence of his father. Defendant Parmeshwari Sahai in his cross-examination has accepted his signatures at Ex.1 from `E' to `F' and has also accepted the signatures of Rajnarayan and Madho Narayan and thumb impression of Smt. Kaushlya Devi on the Will in addition to his own signatures. Thus, the signature of Madan Mohan Lal on the Will have been accepted not only by the plaintiff but by the defendant appellant Parmeshwari Sahai also. It is, therefore, clear that the defendant appellant has not disputed execution of the Will by Madan Mohan Lal and there can be no dispute regarding execution of the same.

11. It may be pertinent to mention here that placing reliance on the decision of their Lordships of the Supreme Court in the case of *Kashibai* vs. *Parwati Bai* **{(1995) 6 SCC 213},** learned counsel for the appellant has contended that as attesting witness of the Will was not examined,

execution of the deed of Will was not valid. With due respect, it can be said that in the facts and circumstances of the case specially the statement of the defendant appellant, the law laid down by their Lordships is not at all applicable in the facts of the present case. In these circumstances, it can well be concluded that the plaintiff has been able to prove this fact that the Will Ex.1 was executed by Madan Mohan Lal and therefore, the findings recorded by the learned trial court on issues Nos.1 and 2 are just and proper and require no interference.

12. Sofar as issues Nos.3 and 4 are concerned, learned trial court placed reliance on what has been written in Ex.1. In Ex.1 it has clearly been mentioned by Madan Mohan Lal that the property situated in Usarigate was purchased in the name of Shiv Prasad and his three sons and the property of Jadughar was purchased in the name of Shiv Prasad and Parmeshwari Sahai. According to the settlement between both the brothers Madan Mohan Lal and Shyam Sunder, the property situated at Usarigate came in the share of Madan Mohan Lal and his three sons and the property situated at Jadughar came in the share of Shyam Sunder and Madan Mohan Lal and his three sons had no share in this property. As stated above, Will was reduced in writing by

Shiv Prasad Saxena (son of Shri Shyam Sunder Lal and nephew of Madan Mohan Lal) and the parties to the litigation have put their signatures on the same. Therefore, oral evidence against the writing of the Will is not acceptable. From the writing of the Will it is clear that Madan Mohan Lal has clearly accepted the fact that Shiv Prasad Saxena was the sole owner of the property situated at Jadughar and that the property situated at Usarigate came in his and his sons share as per the mutual settlement between the parties. In such circumstances, the contention of the defendant appellant that the property situated at Jadughar was mutually partitioned between him and Shiv Prasad and he got the share of Shiv Prasad in the property of Usarigate, cannot be accepted. In view of the writing in Ex.1 and in absence of any cogent and reliable evidence, this fact also cannot be found proved that the defendant appellant spent Rs.6000/- towards purchase of property situated at Usarigate or for any other purpose.

13. A bare perusal of the impugned judgment would reveal that while recording its findings on the issues, the learned trial court has taken into consideration each and every aspect of the matter and properly evaluated the evidence and material available on record, which require no interference.

14. For the discussions above, the first appeal fails and is hereby dismissed with no orders as to cost.

(K.C.Sharma),J.

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